Wong Pot Heng & Anor v Kerajaan Malaysia

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R1-24-91-1991
EUSOFF CHIN J
9 MAY 1992

Statutory Interpretation *— Subsidiary legislation — Amendments thereto — Retrospective effect of amendments — Whether such amendments affected rights of parties acquired under earlier court order — Whether parent Act conferred power to make amendments with retrospective effect — Validity of amendments — Essential (Protection of Depositors) Regulations 1986 regs 9B & 13(2) — Emergency (Essential Powers) Act 1979 s 2(1) — Interpretation Acts 1948 and 1967 ss 2(3), 20 & 30*

The applicants, who were employees of the Co-operative Central Bank ('CCB'), were wrongfully dismissed and were awarded damages and termination benefits. CCB was placed under receivership and its receivers applied to court for directions as to the order of priority of payments out of CCB's assets. The Supreme Court on 25 May 1990 ordered that the applicants should rank equally in priority with CCB's depositors ('the order'). On 25 July 1991 the Yang di-Pertuan Agong amended the Essential (Protection of Depositors) Regulations 1986 by inserting, inter alia, new regs 9B and 13(2). The new regs 9B and 13(2) were deemed to have retrospective effect as from 23 July 1986, the date the 1986 Regulations came into force. The applicants applied for a declaration that the new regs 9B and 13(2) were void or alternatively such provisions did not invalidate the order.

Held, allowing the application:

(1) The words 'subject to the provisions of this section' in s 2(1) of the Emergency (Essential Powers) Act 1979 ('the 1979 Act'), clearly show that the powers conferred on the Yang di-Pertuan Agong to make essential regulations, must be exercised within the confines of s 2 of the 1979 Act only.

(2) Under s 20 of the Interpretation Acts 1948 and 1967 ('the Interpretation Acts') a person or body on whom an Act of Parliament confers powers to make subsidiary legislation, may make subsidiary legislation with retrospective effect provided that the subsidiary legislation does not affect, inter alia, any right or privilege already acquired according to s 30 of the Interpretation Acts. Section 2(3) of the Interpretation Acts however states, inter alia, that ss 20 and 30 of the Interpretation Acts shall only apply if there is no contrary provision in the 1979 Act. Accordingly, in view of s 2(1) of the 1979 Act, s 20 of the Interpretation Acts does not apply to the essential regulations made by the Yang di-Pertuan Agong under s 2 of the 1979 Act.

(3) A close scrutiny of s 2 of the 1979 Act shows that the Yang di-Pertuan Agong has no power to make essential regulations with retrospective effect. Accordingly the new regs 9B and 13(2) were

invalid to the extent that such provisions were made to operate retrospectively. A

(4) The applicants' right under the order to be paid together with the depositors, were preserved notwithstanding the amendments to the 1986 Regulations. Had the new regs 9B and 13(2) been intended to affect the order, such provisions would have said so in clear words. B

[Bahasa Malaysia summary

Pemohon adalah pekerja Co-operative Central Bank ('CCB') yang telah di salah pecat dan diawardkan ganti rugi dan faedah penamatan. CCB telah diletakkan di bawah kuasa penerima dan penerima telah memohon kepada mahkamah untuk arahan mengenai perintah bayaran prioriti daripada aset CCB. Mahkamah Agung pada 25 Mei 1990 telah mengarahkan supaya pemohon patut bertaraf setanding dalam prioriti dengan penyimpan CCB ('perintah itu'). Pada 25 Julai 1991, Yang di-Pertuan Agong telah meminda Peraturan-Peraturan Perlu (Perlindungan Penyimpan-Penyimpan) 1986 dengan memasukkan, antara lain, peraturan baru 9B dan 13(2). Peraturan baru 9B dan 13(2) dianggap mempunyai kesan retrospektif dari 23 Julai 1986, tarikh Peraturan 1986 dikuatkuasakan. Pemohon telah memohon untuk deklarasi bahawa peraturan baru 9B dan 13(2) adalah tidak sah atau sebagai alternatif bahawa peruntukan itu tidak mentaksahkan perintah itu. C D E

Diputuskan, membenarkan permohonan itu:

(1) Perkataan-perkataan 'subject to the provisions of this section' di dalam s 2(1) Akta Darurat (Kuasa-Kuasa Perlu) 1979 ('Akta 1979 itu'), dengan jelasnya menunjukkan bahawa kuasa yang telah diberi kepada Yang di-Pertuan Agong untuk membuat peraturan-peraturan perlu, mestilah digunakan di dalam lingkungan s 2 Akta 1979 itu sahaja. F

(2) Di bawah s 20 Akta Tafsiran 1948 dan 1967 ('Akta Tafsiran itu') seseorang atau badan ke atas mana suatu Akta Parlimen memberi kuasa membuat perundangan subsidiari, boleh membuat perundangan subsidiari dengan kesan retrospektif jika perundangan subsidiari itu tidak melibatkan, antara lain, sebarang hak atau keistimewaan yang telah diperolehi menurut s 30 Akta Tafsiran itu. Akan tetapi, s 2(3) Akta Tafsiran itu menyatakan, antara lain, bahawa ss 20 dan 30 Akta Tafsiran itu hanya terpakai jika tidak terdapat peruntukan yang bertentangan di dalam Akta 1979 itu. Dengan itu, memandangkan s 2(1) Akta 1979 itu, s 20 Akta Tafsiran itu tidak terpakai kepada peraturan perlu yang dibuat oleh Yang di-Pertuan Agong di bawah s 2 Akta 1979 itu. G H

(3) Penelitian yang rapi ke atas s 2 Akta 1979 itu menunjukkan bahawa Yang di-Pertuan Agong tidak mempunyai kuasa membuat peraturan perlu dengan keran retrospektif. Dengan itu, peraturan baru 9B dan 13(2) adalah tidak sah setakat mana peruntukan sedemikian telah dibuat untuk beroperasi retrospektif. I

A (4) Hak pemohon di bawah perintah itu untuk dibayar bersama dengan penyimpan, telah dipelihara walaupun terdapat pindaan kepada Peraturan 1986 itu. Jika peraturan baru 9B dan 13(2) bermaksud untuk melibatkan perintah itu, peruntukan itu akan menyatakannya dengan jelas.]

B **Cases referred to**

1 *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 (folld)
2 *McEldowney v Forde* [1971] AC 632; [1969] 2 All ER 1039 (folld)
3 *Dr Indramani Pyarelat Gupta v WR Nathu & Ors* [1963] 1 SCR 721 (folld)

C 4 *Phillips v Eyre* (1870) LR 6 QB 1 (folld)
5 *Eyre v Wynn-Mackenzie* [1896] 1 Ch 135 (refd)
6 *Day v Kelland* [1900] 2 Ch 745 (refd)
7 *Director of Public Works & Anor v Ho Po Sang & Ors* [1961] AC 901 (folld)

D 8 *Pengarah Tanah & Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 (folld)
9 *Sri Prithvi Cotton Mills Ltd v Broach Borough Municipality* [1969] 2 SCC 283 (folld)

Legislation referred to

E Interpretation Acts 1948 and 1967 ss 2(3), 20, 30
Emergency (Essential Powers) Act 1979 s 2(1), (3), (4)
Federal Constitution art 66(5)
Essential (Protection of Depositors) Regulations 1986 regs 9A, 9B(1)(f), (4), 9(1)(c), 13(1), (2)

F Essential (Protection of Depositors) (Amendment) Regulations 1991

VK Lingam (*Adam Bachek* with him) (*VK Lingam & Co*) for the plaintiffs.

Zaleha bte Zahari (Senior Federal Counsel) for the defendant.

N Chandran (*P Jayasingam* with him) (*Adnan Sundra & Low*) holding
G watching brief for the receivers of CCB.

Benjamin Yean (*Baharom Mohd Yatim* with him) (*Abdul Aziz & Ong*) holding watching brief for Bank Negara.

Cur Adv Vult

H **Eusoff Chin J**: The second plaintiff, Hj Rosli bin Hj Kamaruddin, had claimed in the High Court damages for wrongful termination of his contract of service with the Co-operative Central Bank Ltd ('CCB'). The High Court had ordered the CCB to pay Hj Rosli $425,412.50 as damages. The CCB appealed to the Supreme Court, which dismissed the appeal — see
I [1991] 2 MLJ 37.

The first plaintiff, Wong Pot Heng was also an employee of the CCB. He was wrongfully dismissed from service.The Industrial Court in its Award No 32/1989 ordered the CCB to reinstate and to pay Wong Pot Heng backwages and termination benefits of $306,331.51 plus EPF and SPF

contributions amounting to $118,093.31. The CCB did not challenge the Industrial Court's award. Wong Pot Heng was reinstated for two weeks and then dismissed again by the receivers of the CCB.

On 7 March 1989, upon an application by the Central Bank (Bank Negara Malaysia), under reg 9(1)(c) of the Essential (Protection of Depositors) Regulations 1986 ('the Regulations'), I had ordered two receivers to be appointed to manage the affairs and property of the CCB.

The receivers had applied to the High Court for directions as to the order of priority of payments out of the assets of the CCB. On 9 August 1989, I had made the order on the priority of payment as follows:

(a) all proper costs, charges and expenses under reg 13 of the Regulations;
(b) deposit account and savings account balances (including all interests accrued);
(c) all other unsecured creditors not mentioned hereinbefore including, all persons claiming retrenchment, termination and/or lay-off benefits, all contractual entitlements under contracts of employment and indemnities in lieu of notice (if any), rentals in arrears, deposits paid by house purchasers (if any), withholding taxes, income taxes, utility rates, trade and other creditors [including judgement creditors (if any)].

Both the plaintiffs were therefore placed in the third category. The plaintiffs appealed to the Supreme Court. On 25 May 1990, the Supreme Court set aside the order of the High Court, and made the order that both the plaintiffs 'should rank equally with the depositors immediately after the receivers' (a copy of the order is exhibited as WR6 to the joint affidavit of Wong Pot Heng and Hj Rosli affirmed on 26 November 1991).

Subsequent to the judgement of the Supreme Court, Bank Negara Malaysia filed an originating summons in the High Court seeking leave of the High Court to institute legal proceedings against the receivers of the CCB to obtain an order of the High Court declaring that an aggregate sum of $523m made available by Bank Negara Malaysia to the CCB should be classified under the category of proper costs, charges and expenses under reg 13 of the Regulations and/or alternatively, the amount should be classified as 'rescue fund'.

On 5 March 1991, having heard arguments for two days in open court, I found that the $523m were placed as deposits with receipts issued by the CCB, and I dismissed the application of Bank Negara.

Then on 25 July 1991, the Yang di-Pertuan Agong on the advice of the cabinet (see para 2 of affidavit of the Finance Minister affirmed on 17 December 1991) made amendments to the Regulations vide the Essential (Protection of Depositors) (Amendment) Regulations 1991 ('the amending Regulations'). The amending Regulations introduced a number of new regulations, but reg 9B and 13(2) were made to take effect retrospectively from 23 July 1986 which is the date of the coming into force of the Regulations.

Both the plaintiffs filed the present action against the government (defendants) alleging that the government acted mala fide in advising the Yang di-Pertuan Agong to pass the amending Regulations, and also that on the priority of payments, the new reg 9B(1)(f) ousts the decision of the

A Supreme Court in that the manager (who includes a receiver), is given power to pay depositors in preference to the plaintiffs. They also claim that part of the amending Regulations, regs 9B and 13(2) are invalid because these were made to have retrospective effect contrary to s 2 of the Emergency (Essential Powers) Act 1979 ('the 1979 Act'). Two issues which need be considered here by the court are:

B

(a) whether there is power given to the Yang di-Pertuan Agong to make the amending Regulations with retrospective effect;
(b) whether the amended regulations deprive the plaintiffs of the rights acquired by them by the Supreme Court decision on 25 May 1990.

C As far as Parliament is concerned, subject to any prohibition under the Federal Constitution, the power to legislate with retrospective effect is given to it by art 66(5) of the Federal Constitution. But even so, the law is governed by the principle that where a statute affects the rights of persons, or creates fresh liabilities or imposes new obligations, such an Act ought not to be held to be retrospective in its operation unless the words authorizing it are clear, precise and wholly free from ambiguity.

D

Power to make emergency regulations, and having made them to amend them, is given to the Yang di-Pertuan Agong by s 2 of the 1979 Act and I quote the relevant provision:

E

(1) *Subject to the provisions of this section*, the Yang di-Pertuan Agong may make any regulations whatsoever (in this Act referred to as 'Essential Regulations') which he considers desirable or expedient for securing the public safety, the defence of Malaysia, the maintenance of public order and of supplies and services essential to the life of the community.

(2) Without prejudice to the generality of the powers conferred by the preceding subsection, Essential Regulations may, so far as appear to the Yang di-Pertuan Agong to be necessary or expedient for any of the purposes mentioned in that subsection —

F

...

(j) provide for amending any written law, for suspending the operation of any written law and for applying any written law with or without modification;

G

...

(3) Essential Regulations may provide for empowering such authorities, persons or classes of persons as may be specified in the regulations to make orders, rules and by-laws for any of the purposes for which such regulations are authorised by this Act to be made, and may contain such incidental and supplementary provisions as appear to the Yang di-Pertuan Agong to be necessary or expedient for the purposes of the regulations.

H

(4) An Essential Regulation, and any order, rule, or by-law duly made in pursuance of such a regulation shall have effect notwithstanding anything inconsistent therewith contained in any written law, including the Constitution or the Constitution of any State, other than this Act or in any instrument having effect by virtue of any written law other than this Act. (Emphasis added.)

I

There is no doubt that, subject to the provisions contained in s 2, the Yang di-Pertuan Agong can make the amending Regulations in the exercise of the powers delegated to him by Parliament through s 2 of the 1979 Act. There

is also no doubt whatsoever that the courts have jurisdiction to declare invalid a delegated legislation if in making it, the person/body to whom power is delegated to make the rules or regulations, acted outside the legislative powers conferred on him/it by the Act of Parliament under which the rules or regulations were purported to have been made. A

When the validity of a delegated legislation is questioned, Lord Greene MR in *Carltona Ltd v Commissioners of Works*[1] said: B

> All that the court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the legislature and to see that those powers are exercised in good faith. Apart from that, the courts have no power at all to enquire into the reasonableness, the policy, the sense, or any other aspect of the transaction. C

When faced with such issue, the court's functions are explained as follows by Lord Diplock in *McEldowney v Forde*[2] at p 658:

> Parliament makes laws and can delegate part of its power to do so to some subordinate authority. The courts construe law whether made by Parliament directly or by a subordinate authority acting under delegated legislative powers. The view of the courts as to whether particular statutory or subordinate legislation promotes or hinders the common weal is irrelevant. The decision of the courts as to what the words used in the statutory or subordinate legislation mean is decisive. Where the validity of subordinate legislation made pursuant to powers delegated by Act of Parliament to a subordinate authority is challenged, the court has a threefold task: first, to determine the meaning of the words used in the Act of Parliament itself to describe the subordinate legislation which that authority is authorized to make, secondly, to determine the meaning of the subordinate legislation itself and finally to decide whether the subordinate legislation complies with that description D E

As regards the power of the Yang di-Pertuan Agong to legislate regs 9B and 13(2) with retrospective effect, I need to look at the words used in s 2 of the 1979 Act, and the provisions in the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) ('the Interpretation Acts'). Section 20 of this Act states: F

> Subsidiary legislation may be made to operate retrospectively to any date which is not earlier than the commencement of the Act or other written law under which it is made or, where different provisions of that law come into operation on different dates, the commencement of that law under which it is made:
>
> Provided that no person shall be made or shall become liable to any penalty in respect of any act done before the date on which the subsidiary legislation was published. G H

It is obvious that generally, a subsidiary legislation which is defined in the Interpretation Acts to include a regulation, or an amendment thereto, can be made to operate retrospectively provided that the subsidiary legislation or the amendment does not affect any right, privilege, obligation or liability already acquired, accrued, or incurred under any law. I

The word 'written law' is defined by the Interpretation Acts to include 'Acts of Parliament and subsidiary legislation made thereunder'. Section 30 of the Interpretation Acts states:

A (1) The repeal of a written law in whole or in part shall not —

(a) affect the previous operation of the repealed law or anything duly done or suffered thereunder; or
(b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law; ...

B Part I of the Interpretation Acts applies to the interpretation of the 1979 Act because s 2 of the Interpretation Acts says so. But s 2(3) of the Interpretation Acts states:

Part I *shall not* apply where there is

C (a) express provision to the contrary; or
(b) something in the subject or context inconsistent with or repugnant to its application. (Emphasis added.)

Section 2(3) of the Interpretation Acts, therefore, clearly states that the provisions in Pt I of this Act *shall be applied only if* there is no provision to the contrary, contained in the 1979 Act. Both ss 20 and 30 of the Interpre-
D tation Acts are in Pt I of the Act.

Section 2(1) of the 1979 Act which confers power on the Yang di-Pertuan Agong to make emergency regulations, begins with the words 'Subject to the provisions of this section'. This clearly shows that the powers conferred on the Yang di-Pertuan Agong to make essential regula-
E tions are limited and confined only to the provisions contained in s 2. These words impose conditions and restrictions on the powers of the Yang di-Pertuan Agong when making the essential regulations. Therefore, whenever the Yang di-Pertuan Agong makes an essential regulation in the exercise of the powers conferred on him by the 1979 Act, he must not act outside the powers so conferred on him by that section.

F In my view, the words 'subject to the provisions of this section' shows Parliament's intention that,while conferring overwhelming powers on the Yang di-Pertuan Agong by ss 2(3) and (4) to make emergency regulations, the powers must be exercised within the confines of this section only. He must not go outside the scope of this section when exercising his powers to
G make emergency regulations. If, therefore, s 2 of the 1979 Act, does not confer on him the power to make emergency regulations with retrospective operation, he is prohibited by law from making emergency regulations with retrospective effect.

A close scrutiny of s 2 of the 1979 Act shows that this section does not confer power on the Yang di-Pertuan Agong to make an emergency regu-
H lation with retrospective effect. The question is whether the provision of s 20 of the Interpretation Acts can apply to give the Yang di-Pertuan Agong power to make emergency regulations having retrospective effect. For the reasons I have just stated, the answer is that s 20 of the Interpretation Acts does not apply to emergency regulations made by the Yang di-Pertuan
I Agong in exercise of the powers conferred on him by s 2 of the 1979 Act. I would only agree that the general power to make regulations with retrospective effect given by s 20 of the Interpretation Acts, would apply to emergency regulations made by the Yang di-Pertuan Agong, if the limitation phrase 'subject to the provisions of this section' is not there in s 2 of the

1979 Act. Therefore, to enable the Yang di-Pertuan Agong to make these essential regulations with retrospective effect, he must first be expressly conferred with such powers by s 2 of the 1979 Act itself.

At the risk of repeating myself, my finding is that Parliament can always legislate retrospectively unless there is any prohibition under the Federal Constitution. By the provisions of s 20 (but subject to s 30) of the Interpretation Acts, a person or body, on whom an Act of Parliament confers powers to make subsidiary legislation, may also generally make subsidiary legislation with retrospective effect. But where the provisions of s 20 of the Interpretation Acts has been excluded, such as has happened here, the power to make subsidiary legislation with retrospective effect must be given expressly to the person or body by the section conferring power on the person or body in clear and unambiguous words.

In *Dr Indramani Pyarelat Gupta v WR Nathu and Ors*[3] the Supreme Court of India held:

> ... If the conferment of power to make delegated legislation proprio vigore carried with it to make a rule or byelaw with retrospective operation, it may become an instrument of oppression. In these circumstances, it has been rightly held that the provision conferring such a power must be strictly construed and unless a statute expressly confers a power to make a rule or byelaw retrospectively, it must be held that it has not conferred any such power. *It is said that such a strict construction may prevent a rule-making authority from making a rule in an emergency, though the occasion demands or justifies a rule with retrospective effect. The simple answer to this alleged difficulty is that if the legislature contemplates or visualizes such emergencies, calling for the making of such rules or byelaws with retrospective effect, it should expressly confer such power. It is also said that the government can be relied upon to make such rules only on appropriate occasions. This court cannot recognize implied powers pregnant with potentialities for mischief on such assumptions. That apart, the scope or ambit of a rule cannot be made to depend upon the status of a functionary entrusted with a rule-making power. In public interest the least the court can do is to construe provisions conferring such a power strictly and to confine its scope to that clearly expressed therein.* (Emphasis added.)

The amending Regulations made on 26 July 1991 clearly state that both the new regs 9B and 13(1) are to take effect retrospectively to the commencement date of the Regulations which is 23 July 1986. The word 'retrospective' means looking backwards or survey of the past. A retrospective legislation contemplates the past and gives to a previous transaction some different legal effect from that which it had under the law when it occurred. Every legislation which takes away or impairs a vested right acquired under existing law, or creates a new obligation, imposes a new duty or attaches a new disability in respect of a transaction or consideration already past, must be deemed to be prospective. If a written law provides that as, at a past date, the law shall be taken to have been that which it was not, that law is deemed to be retrospective even though that law does not expressly say that it is to commence from a date in the past. Retrospective is artificial, deeming a thing to be what it was not.

Willes J in *Phillips v Eyre*[4] at p 23 said:

> Retrospective laws are, no doubt, prima facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is

A to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law ... Accordingly, the court will not ascribe retrospective force to new laws affecting rights, unless by express words or necessarily implication it appears that such was the intention of the legislature.

B I would therefore hold that s 20 of the Interpretation Acts does not apply to emergency regulations made under s 2 of the 1979 Act. Since s 2 of the 1979 Act itself does not contain any provision empowering the Yang di-Pertuan Agong to make emergency regulations with retrospective effect, I hold that both the new regs 9B and 13(2) inserted into the Regulations by the amending Regulations are invalid in so far as it purports to operate C retrospectively.

In the circumstances, it is not necessary for me to examine whether or not the retrospective operations of both the inpugned regulations had been exercised in good faith by the defendant.

Assuming that the Yang di-Pertuan Agong has power in this case to D make the amending Regulations with retrospective effect, do the new regulations affect the acquired right of the plaintiffs? I would begin firstly, by examining a few authorities.

In *Eyre v Wynn-Mackenzie*,[5] the Court of Appeal held that the Mortgagees Legal Costs Act 1895 which was passed on 6 July 1895 and which had retrospective effect could not be applied to a judgment which was given in E 1893. Lindley LJ said at p 137:

> If this application is to be regarded as an appeal on the merits, it is impossible for us to say that the judgment was wrong as the law stood at the time when it was given. It is obvious that the Act was not intended to interfere with judgments which had already been given by the court. If we give leave to appeal in this case, F *we should be reopening all judgments of a similar kind which had been given prior to the passing of the Act. We cannot do that.* (Emphasis added.)

This was followed in *Day v Kelland*[6] at p 748 when Lord Alverstone CJ held:

> In my opinion the rights of the parties were *determined by the order of April 1893. Everything which has since been done in the action has been done under that order.* It G is said that in working out that order the plaintiff ought to have the benefit of the change in the law which was made by the Act of 1895. But to allow that would, I think, be to alter rights which were ascertained before the passing of the Act. (Emphasis added.)

H The Supreme Court had determined and ascertained the provision of reg 13 of the Regulations (now renumbered as 13(1)) which states:

> All proper costs, charges and expenses, including remuneration, of receivers and other persons *appointed under these Regulations* shall be payable out of the assets of the deposit-taker in priority to all other claims. (Emphasis added.)

I The Supreme Court had decided that the plaintiffs must be paid when payments were to be made to the depositors. It reversed the order of the High Court that the plaintiff should be paid only after all depositors had been paid. In other words, the Supreme Court's order gave the plaintiffs the right to be paid at the same time when payments were to be made to the

depositors. The order of the Supreme Court imposed an obligations on the part of the receivers to make payments to the two plaintiffs as if the plaintiffs were depositors. It is true that the receivers have yet to distribute the assets of the CCB. In *Director of Public Works & Anor v Ho Po Sang & Ors*[7] at p 922, Lord Morris in the Privy Council said:

> It may be, therefore, that under some repealed enactment a right has been given but that in respect of it some investigation or legal proceeding is necessary. The right is then unaffected and preserved.

Therefore, the rights of the plaintiff to be paid together with the depositors are preserved, notwithstanding the amendments to the Regulations.

As far as I can see, the new reg 13(1) does not affect the decision of the Supreme Court as the words used in s 13 are 'other persons appointed *under* these Regulations'. There must firstly be, in the Regulations, power to appoint, conferred on someone and that someone has exercised that power by making the necessary appointments. The receivers had been appointed by the court. But the Bank Negara (Central Bank) and the government are not 'other persons appointed under these Regulations'. The new reg 13(2) states:

> The proper costs, charges and expenses referred to in paragraph (1) shall include the following, regardless whether the same were paid personally by the receivers or the other persons referred to in paragraph (1) (hereinafter in this regulation referred to as 'other persons'), or were paid by such receivers or other persons out of the assets of the deposit-taker, on behalf of the deposit-taker.

The new reg 13(2) seeks only to enumerate what 'the proper costs, charges and expenses referred to in reg 13(1)' are.

The new regs 9B(1)(f) and (4) however, appears to affect the subsisting order given by the Supreme Court. It states:

> (1) Subject to these Regulations, a manager may take all action as may be necessary in relation to the business, affairs and property of the deposit-taker, or for the purpose of protecting the interests of the depositors, creditors or customers, or persons having any lawful dealings or transactions with the deposit-taker, and, without prejudice to the generality of such power, the manager may, in particular, do all or any of the following:
>
> ...
>
> (f) apply the assets of the deposit-taker which are at any time in his possession, or under his custody or control, during the course of carrying on the business of the deposit-taker or the management of the affairs and property of the deposit-taker, subject to regulation 13, to meet the deposit liabilities of the deposit-taker *in preference to all other unsecured liabilities of the deposit-taker.*
>
> ...
>
> (4) The Central Bank may generally, or in any particular case, at any time issue such directions in writing as it deems fit to a manager (not being the Central Bank itself) with regard to the exercise by the manager of the powers conferred upon it under paragraph (1), *and the manager shall comply* with and act in accordance with such directions, and where the Central Bank is itself the manager, it may do all such things which it has the power to direct as aforesaid another manager to do. (Emphasis added.)

A This new reg 9B(1)(f) confers power on the receivers to pay the depositors in preference to the plaintiffs in direct contravention of the Supreme Court decision.

It was submitted by the plaintiffs that the new reg 9B(4) gives the Central Bank the power to issue directions generally or in any particular case, to the receiver who must comply with the directions. But I think the B directions issued must in any event comply with the provisions contained in the Regulations as amended. In *Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd*,[8] Raja Azlan Shah (acting CJ as he then was) at p 148 held:

> C Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these D days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen; so that the courts can see that these great powers and influence are exercised in accordance with law.

The provisions of the new reg 9A does not affect the plaintiffs as this E regulation deals with priority of payments only in the event of the CCB being wound up, liquidated, or put into bankruptcy. But even if the CCB is wound up or liquidated, the provisions of the new reg 9A will not affect the right of the plaintiffs to be paid together with the depositors since they have already acquired that right by the order of the Supreme Court given before the amendments to the Regulations were made.

F Having examined the amending Regulations, I am of the view that the amending Regulations is not intended to affect judgments or order of the court given or made under the Regulations before the amendments.

In respect of the new regs 9B and 13(2), the amending Regulations simply declare that these two regulations 'were deemed to have come into G operation on the date of commencement of the principal Regulations', ie on 23 July 1986. Had the amending Regulations intended to affect final and binding judgments or orders made by the court under the Regulations before the amendments, it would have said so in clear words to nullify the final decrees of the courts. In *Sri Prithvi Cotton Mills Ltd v Broach Borough Municipality*,[9] Hidayatullah CJ held that if the legislature acting within its H legislative competence wanted to neutralize or reopen a court's decision, 'it is not sufficient to declare merely that the decision of the court shall not bind, for that tantamounts to reversing the decision in exercise of judicial power which the legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so funda- I mentally altered that the decision could not have been given in the altered circumstances'. The amending Regulations has not radically altered reg 13 of the Regulations on which the decree of the Supreme Court proceeded, except to amplify the meaning of words existing therein.

The plaintiffs' joint application is for this court to declare that the amending Regulations is void and of no effect, and alternatively, for a declaration that the said amending Regulations does not nullify or invalidate the unanimous order of the Supreme Court dated 25 May 1990.

For the reasons given, I find that the amending Regulations, the Essential (Protection of Depositors) (Amendment) Regulations 1991, is valid except for the new regs 9B and 13(2) which I now declare to be invalid to the extent that they were made to operate retrospectively. I further find that the amending Regulations does not affect the rights acquired by the plaintiffs in the Supreme Court order dated 25 May 1990, and I make the declaration to that effect. I award costs to the plaintiffs.

Application allowed.

Reported by Wong Kian Kheong